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MEMORANDUM

BY

MR. BLAKE

OF HIS

VIEWS ON THE SUBJECT OF THE ROYAL COMMISSION AND INSTRUCTIONS

TO THE

GOVERNOR-GENERAL OF CANADA.

Colonial Office,
August 1876.

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CONFIDENTIAL.

Memorandum by Mr. Blake of his views on the subject of the Royal Commission and Instructions to the Governor-General of Canada.

The Honourable E. Blake to the Earl of Carnarvon.—(*Received about July* 1, 1876.)

My Lord,

IT may be convenient, as a basis for discussion, that I should lay before your Lordship a Memorandum of my present views on the subject of the Royal Commission and Royal Instructions to the Governor-General of Canada, with reference to which I am charged to confer with your Lordship.

The existing forms in the case of Canada have been felt for some time to be capable of amendment for reasons which require that special consideration should be given to her position, and which render unsuitable for her the forms which may be eminently suited to some of the Colonies.

Canada is not merely a Colony or a Province: she is a Dominion composed of an aggregate of seven large provinces federally united under an Imperial Charter, which expressly recites that her constitution is to be similar in principle to that of the United Kingdom. Nay, more, besides the powers with which she is invested over a large part of the affairs of the inhabitants of the several provinces, she enjoys absolute powers of legislation and administration over the people and territories of the north-west, out of which she has already created one province, and is empowered to create others, with representative institutions.

These circumstances, together with the vastness of her area, the numbers of her free population, the character of the representative institutions and of the responsible Government which as citizens of the various provinces and of Canada her people have so long enjoyed, all point to the propriety of dealing with the question in hand in a manner very different from that which might be fitly adopted with reference to a single and comparatively small and young Colony.

Besides the general spread of the principles of constitutional freedom there has been, in reference to the Colonies, a recognised difference between their circumstances, resulting in the application to those in a less advanced condition of a lesser measure of self-government, while others are said to be invested with "the fullest freedom of political government;" and it may be fairly stated that there is no dependency of the British Crown which is entitled to so full an application of the principles of constitutional freedom as the Dominion of Canada.

I feel, however, that I am not on the present occasion charged with the duty of entering into all the considerations involved in this proposition, or of proposing anything requiring Parliamentary action, but am limited to the suggestion of such interpretations of and changes in the Commission and Instructions as may remove or lessen some of the anomalies which they present.

Before referring to the several clauses which seem to call for remark I may observe that by the 12th clause of the British North America Act, certain powers and authorities, defined only by reference to various statutes, are conferred, some on the Governor, and others on the Governor in Council. It would seem expedient to refer

in the Commission to this grant in such terms as to avoid any implication of an attempted restriction of any of these powers.

Commission, Claase 4.—The exercise of the prerogative of pardon with which this clause deals is also dealt with by clause 11 of the instructions, and they may, perhaps, be conveniently treated together.

The subject of pardon being in effect a branch of criminal justice has been rightly assumed to be within the legislative powers of the Parliament of Canada; and various provisions are made on that subject by the 125th and following sections of the Canadian Criminal Procedure Act of 1869, 32 and 33 Vict., cap. 29. Section 129 (preventing any of the clauses from limiting or affecting the Royal prerogative of mercy), while it evidences the adoption of that policy by Parliament is, of course, a reiteration of the competency of Parliament to act in the other direction. In the present state of legislation it may be suggested that the power of pardon would be most fitly vested in the Governor-General under general words in the Commission empowering him to act in that matter as Her Majesty's representative in so far as concerns persons amenable to the Canadian criminal laws.

If, however, the more specific language is to be retained it would seem reasonable to extend the power to grant a pardon to accomplices to cases where a crime has been committed without Canada for which the offender may be tried therein. I may observe that it is not intended for the future in any case, save possibly that of a political offender, to advise the Governor to make it a condition of any pardon that the offender should be banished or absent himself from the Dominion.

The principal reasons for this determination are to be found in the correspondence with the Australian Colonies, transmitted for the information of the Government in your Lordship's despatch of 5th of November, 1875. They are such as to render it impossible to resist your Lordship's conclusions, since it cannot be denied that it is wrong to thrust upon other communities a criminal deemed unfit to live amongst his own people.

I have, however, to suggest that it may be just and convenient that the restriction should not be applicable to the cases of political criminals, to whose offences as a rule the considerations which make such a condition obnoxious hardly apply, while public convenience and the tranquillity of the country may occasionally be best consulted by so disposing of them.

Instructions.—Clause 11 instructs the Governor as to the exercise of the power of pardon in capital cases. By the Statutes of Canada 1873, 36 Vict., cap. 3, provision is made in such cases for a report from the Judge to the Secretary of State for the information of the Governor in sufficient time for the signification of his pleasure before the arrival of the day fixed for execution. In this state of the law it seems unnecessary to instruct the Governor to call upon the presiding Judge for a report. The mode prescribed by the instructions for the consideration of the report varies from the mode actually observed in this as in other matters as elsewhere explained. It is, however, the invariable practice to dispose of capital cases in Council, while other cases are, as a rule, disposed of on reports from the Minister of Justice without the intervention of Council, though of course these also may become the subject of action in Council.

These are minor matters.

The main question is upon the instruction given to the Governor, that he is, in capital cases, either to extend or withhold a pardon or a reprieve, according to his own deliberate judgment, whether the members of the Council concur in it, or otherwise. Having regard to the form of the Commission, and to this instruction, the proper inference is that in all cases not capital the action of the Governor by way of pardon or commutation is to be, as is his action in other matters, under advice, and that it is only in the capital cases, which are specially dealt with by the instruction, that he is to act upon his own judgment, even against advice. The distinction thus created was not maintained in the Australian correspondence, and does not appear well-founded. It provides a different rule of action, based simply on the gravity of the sentence, whereas the only tenable distinction that occurs to me is between the cases (whether capital or not) which may involve Imperial interests and those which not involving such interests, concern solely the internal administration of the affairs of the Dominion.

The cases involving Imperial interests are referred to by your Lordship in your despatch on this subject to Governor Robinson of May 4th, 1875, as cases where "matters of Imperial interest or policy, or the interests of other countries or colonies, are involved." Your Lordship instances the case of a kidnapper tried and sentenced

under an Imperial Act by a Colonial Court, and that of a convict whose sentence was commuted on condition of exile from the Colony. With the latter class I have dealt in my remarks on the fourth clause of the Commission. With the former class may be ranged those of offenders who are subjects of other countries, and of certain political offenders.

It is probable that even in the exceptional cases suggested (which of course involve as well internal as well as external interests) the action of the Governor, notwithstanding the existing instructions, would generally be in accordance with advice; and no doubt to act against advice would be to incur a very grave responsibility, though not to the Canadian people. It would also seem that in the vast majority of exceptional cases the exception would be found to be technical, not real, the substantial interests involved being solely Canadian; in which event the Governor would, notwithstanding the instruction, presumably act under advice. These observations, however, only show that the instruction cannot be maintained.

I have freely recognized the possible existence in the excepted classes of Imperial interests; and this possibility furnishes, in my view, the only ground for the application to these classes of a special rule. Having regard, however, to the considerations I am about to urge with reference to the 5th clause of the instructions, I do not think it possible to formulate any such rule, and I suggest that the best course is not to attempt it, but to leave these rare and exceptional matters to be disposed of, when they arise, by mutual adjustment, in which necessarily due regard must be had to the constitutional powers and relations of the Crown, the Governor-General, and the Council.

If my proposals for the omission of both the special rule and the 5th clause of the instructions be not adopted, I have further to suggest that any special rule on this subject may with less inconvenience be embraced in the general language substituted for that of the 5th clause, and that under no circumstances should there be a special rule particularly directed to the pardoning power.

It now becomes my duty to refer briefly to the arguments upon which in the case of the Australian Colonies it has been affirmed that the independent action of the Governor in the exercise of this power should be of a wider range than that which I suggest as proper in the case of Canada.

To the argument for independent action in certain exceptional cases I have already alluded, and I refer to it now only in order to point out that the existence of an exception, if admitted, is not a reason for giving in all cases independent power, but rather the reverse.

It is the exception which proves the rule; all arguments based upon its existence are arguments for exceptional treatment, but they are not reasons for making that treatment general, and they leave applicable to the bulk of the cases the rule which, but for the exception, would be of universal application. The other reasons referred to appear to be—

1. That the high prerogative in question being personally delegated to the Governor, he cannot be in any way relieved from the duty of judging for himself in every case in which that prerogative is to be exercised; as the responsible Minister of the Crown in a Colony cannot be looked on as occupying the same position in regard to the Queen's prerogative of pardon as the Home Secretary. I would, in this connection, refer to the views of the Canadian Privy Council on the general question of ministerial powers and responsibilities, as expressed in the Minute of Council of 29th February, 1876, and the report annexed thereto, thinking it needless to restate in detail the position taken on the general subject, and the arguments advanced against the proposed division of powers and responsibilities.

The prerogative of pardon has been rightly vested by statute in the Sovereign, since all criminal offences are against "her peace," or "her crown and dignity," and it is reasonable that the person injured should have the power to forgive; but neither the punishment of these injuries nor their forgiveness (both being matters which affect the people) is arbitrary; the one can be, and accordingly is, regulated principally by law, though a wide discretion as to the punishment is given in many cases to the Judge; the other being mainly beyond the province of law, is yet like the remaining prerogatives of the British Sovereign, held in trust for the welfare of the people, and, so far as it is beyond the province of law, is regulated by the general principle of the constitution.

There may in this, as in other instances, be some difficulty in running out an exact analogy between the position in Canada and in England; but I venture to suggest that the application to this subject of the fundamental rule of the Constitution, as expounded in the report referred to, affords the true solution of the

question, and would furnish the nearest possible analogy between the practice to be pursued in each country.

In the United Kingdom, while the British Parliament makes laws for the punishment of crimes committed by the inhabitants, the Sovereign exercises her prerogative of mercy towards such criminals, under the advice of her Minister there, who is chosen as other British Ministers are chosen, and is responsible to the British Parliament for his advice. Therefore, in the United Kingdom, this power is exercised under the same restraints and with the same securities to the people concerned as the other powers of Government.

This, it seems to me, is the practical result which should be obtained in Canada.

There, while the Canadian Parliament makes laws for the punishment of crimes committed by the inhabitants of Canada, the Sovereign should exercise the prerogative of mercy towards such criminals under the advice of her Privy Council for Canada, or of her Minister there, chosen as her other Canadian Ministers are chosen, and responsible to the Canadian Parliament for his advice; nor having regard to the reasons given in the report already referred to, can it be conceded that the suggested responsibility of the Governor to the Colonial Office for the exercise of this power independent of, though after, advice, would be a satisfactory substitute for the responsibility to the Canadian people of a Minister charged with the usual powers and duties in this respect.

2. The second argument is that expediency requires that this prerogative should be independently exercised by the Governor, and it is suggested that "the pressure, political as well as social, which would be brought to bear upon the Ministers, if the decision of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequences might be a serious interference with the sentences of the Courts."

This suggestion, which is supported in the case of one of the Australian Colonies by the views of local authorities, is not applicable, in a general sense, to Canada, where it has been commonly supposed that the decision of this, as of other questions, rests practically with the Ministers; where it is believed that the embarrassments suggested would but rarely occur, and that, at any rate, Ministers would not be relieved of any such embarrassments by the proposed course; and where it is confidently maintained that no improper interference with the sentences of the Courts would result.

No doubt in the exercise of this, as of many other powers of Government, embarrassments and difficulties may from time to time arise; but it is believed that their true solution will depend upon the unflinching application to every question of the Constitutional principle, and that greater difficulties and troubles will arise from the avoidance than from the assumption of the responsibility which I suggest should, by the alteration of the existing instruction, be imposed on ministers even in capital cases.

Commission, Clause 6.—The latter part gives authority to the several Lieutenant-Governors to assemble, prorogue, and dissolve the Legislative bodies of the several provinces. It would seem that any powers which may be thought necessary should have been conferred upon the Lieutenant-Governors by the British North America Act, and it appears to me they must be taken to be expressly or implicdly so conferred.

The provision giving these powers to the Lieutenant-Governors, by the Governor-General's Commission appears somewhat objectionable, and it might perhaps be advisable to leave these matters to be dealt with by those offieers under the British North America Act, the 82nd section of which in terms confers on the Lieutenant-Governors of the new Provinces of Ontario and Quebec the power in the Queen's name to summon the local bodies, a power which no doubt was assumed to be continued to the Governors of the other Provinees.

Commission, Clause 7, appears unsuitable to Canada. All the subjects with which it deals, namely, marriage licenses, letters of administration, probates of wills, and the custody and management of lunatics and idiots and their estates, are within the exclusive control of the several provinces, and are dealt with under local legislation, the Governor-General and his advisers having no concern with these matters. The only possible application it can have is to the north-west territories pending the establishment there of local government; and as this is shortly to take place, it would seem proper to omit the clause in the next Commission.

Royal Instructions, Clause 5, purports to authorize the Governor to act under limitations in opposition to advice.

In so far as it may be intended by the clause to vest in the Governor the full constitutional powers which Her Majesty, if she were ruling personally instead of through his agency, could exercise, it is, of course, unobjectionable. The Governor-General has an undoubted right to refuse compliance with the advice of his Ministers, whereupon the latter must either adopt and become responsible for his views, or leave their places to be filled by others prepared to take that course.

But the language of the clause (which for the suggested purpose would be unnecessary) is wider, and seems to authorize action in opposition to the advice not merely of a particular set of Ministers, but of any Ministers.

Notwithstanding the generality of the language, there are but few cases in which it would be possible to exercise such a power, for as a rule the Governor does and must act through the agency of Ministers, and Ministers must be responsible for such action.

The cases not falling within this limitation may be said for practical purposes to be those in which the line taken by the Governor is purely negative—in which, while dissenting from action proposed to him by Ministers, he does nothing but dissent. Even in such cases I presume no one would contend that any such power should be exercised under this clause save upon the argument that there are certain conceivable instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it may be considered that full freedom of action is not vested in the Canadian people. It appears to me that any such cases must, pending the solution of the great problem of Imperial Government, be dealt with as they arise. Were the clause retained, though in a limited form, it would be found increasingly difficult to divest the Canadian Ministers even in such cases of full responsibility for the action of the Governor; and the question in each case of the relative rights and duties of the Governor and the Ministers would probably be more and more earnestly discussed.

It is, so far as I can see, impossible to formulate any limitation. The effort to reconcile by any form of words the responsibility of Ministers under the Canadian constitution with a power to the Governor to take even a negative line independently of advice cannot, I think, succeed. The truth is, that Imperial interests are, under our present system of government to be secured in matters of Canadian executive policy, not by any such clause in a Governor's instructions (which would be practically inoperative, and if it can be supposed to be operative would be mischievous); but by mutual good feeling, and by proper consideration for Imperial interests on the part of Her Majesty's Canadian advisers: the Crown necessarily retaining all its constitutional rights and powers which would be exercisable in any emergency in which the indicated securities might be found to fail.

I have, therefore, for the reasons suggested here and in the former part of this letter, to propose that this clause should be omitted; the Governor-General's status being determined by our own constitutional Act, that officer remaining, of course, subject to any further instructions, special or general, which the Crown may lawfully give should circumstances render that course desirable.

Clause 6.—It may be proper to observe that the practice for a very great number of years has been that the business of Council is done in the absence of the Governor. On very exceptional occasions the Governor may preside, but these would occur only at intervals of years, and would probably be for the purpose of taking a formal decision on some extraordinary occasion, and not for deliberation.

The mode in which the business is done is by report to the Governor of the recommendations of the Council, sitting as a Committee, sent to the Governor for his consideration, discussed where necessary between the Governor and the first Minister, and becoming operative upon being marked "approved" by the Governor. This system is in accordance with constitutional principle, and is found very convenient in practice. It is probable that the language of this clause is not intended to require a different practice, but it has been thought right to point out the actual working of the system under it with a view to any amendment which may be thought necessary.

Clause 7.—In practice the minutes of proceedings of Council are not read over and confirmed. These proceedings are extremely voluminous, a very large part of the public business which is transacted in England by departmental action being managed in Canada though Council. In the majority of cases the minutes have been in the interval approved by the Governor and acted on. It might be as well, under the circumstances, to omit the words providing for this procedure.

Clause 9 specifies the classes of Bills to be reserved.

It is beyond my province here to discuss the propriety of the clauses of the British

North America Act on the subject of the reservation and disallowance of Bills, or to touch on the principles on which the power of disallowance while retained in the present form should be exercised. These questions involve another difficult phase of the problem of Imperial Government, but one that is not directly presented for consideration on this occasion, and on which, therefore, I express no opinion.

It appears to me that in all the classes of cases mentioned in the clause referred to, save perhaps Class 8, it would be better and more conformable to the spirit of the constitution of Canada, as actually framed, that the legislation should be completed on the advice and responsibility of Her Majesty's Privy Council for Canada; and that, as a protection to Imperial interests, the reserved power of disallowance of such completed legislation is sufficient for all possible purposes. This view seems to me to apply with even added strength to certain of the classes, viz., 1, 3, 4, 6, and that part of 7 not referring to the prerogative.

I may shortly observe in support of this view that, irrespective of the general powers conferred on the Parliament of Canada, among its express powers are those of legislation on subjects comprised in these classes; that in practice bills on several of these subjects have been assented to without reservation; and that this practice would appear to harmonize with the theory of the constitution as it is framed, by distributing the responsibilities and powers of Her Majesty's Colonial and Imperial Advisers, allowing on the responsibility of the former the completion of Colonial legislation on authorized subjects, while it reserves to be exercised on the responsibility of the latter the Imperial prerogative of disallowance.

Clause 10.—The latter part, which provides for transmission of the journals and minutes of the Legislative bodies of the Dominion to be required from the clerks thereof, I assume applies only to the Senate and House of Commons of Canada.

These journals and minutes being invariably published there is no reason why copies of them should not be transmitted as heretofore; but it is, of course, understood that such action involves neither invasion nor abandonment of the undoubted privileges of the Canadian Senate and Commons in respect of matters by them debated, but not by them communicated to the Governor.

Clause 12.—It may be suggested that it would be expedient to alter the language by simply providing that all commissions granted should, unless otherwise provided by law, be during pleasure, without specifying some of the classes of officers referred to in the Clause. The Judges should no longer be named in the Clause since under the law, and in accordance with British constitutional practice, the Judges generally, if not universally, hold their offices during good behaviour. It seems, under these circumstances, inexpedient that this class of officers should continue to be mentioned as a class whose commissions may with propriety be during pleasure, although, of course, the language does not prevent their commissions being couched in proper terms according to law.

This completes the observations which occur to me.

I have, &c.

(Signed) EDWARD BLAKE.

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